

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

FRACTUS, S.A., Plaintiff, v. AT&T MOBILITY LLC,	§ § § § § § § §	CIVIL ACTION NO. 2:18-CV-00135-JRG LEAD CASE JURY TRIAL DEMANDED
T-MOBILE US, INC., T-MOBILE USA, INC.,	§ § § § § § §	CIVIL ACTION NO. 2:18-CV-00137-JRG MEMBER CASE
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, Defendants.	§ § § § § § §	CIVIL ACTION NO. 2:18-CV-00138-JRG MEMBER CASE
COMMSCOPE TECHNOLOGIES LLC CELLMAX TECHNOLOGIES AB Intervenor Defendant.	§ § §	

MOTION FOR SUMMARY JUDGMENT OF NO PRE-SUIT DAMAGES

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3.	Deposition Transcript of Carmen Borja (Apr. 11, 2019)
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[REDACTED]	[REDACTED]

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I. INTRODUCTION

As a matter of law, Fractus, S.A. (“Fractus”) cannot recover pre-suit damages, because it failed to comply with the marking and actual notice requirements of 35 U.S.C. § 287(a). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Fractus also has admitted [REDACTED]. [REDACTED]. Thus, no facts exist that would allow Fractus to collect pre-suit damages. Accordingly, this Court should enter summary judgment of no pre-suit damages.

II. STATEMENT OF ISSUES TO BE DECIDED

Whether Fractus is precluded from recovering pre-suit damages under 35 U.S.C. § 287, where Fractus has no evidence that it provided actual notice of the alleged infringement or that it complied with its marking obligations before filing these cases.

III. STATEMENT OF UNDISPUTED FACTS

1. Although Fractus originally asserted ten patents in this case, Fractus since has dropped half of those patents, leaving the following five Asserted Patents: U.S. Patent Nos. 6,937,191, 7,250,918, 7,557,768, 7,932,870, 8,228,256 (collectively, “the Asserted Patents.”).
2. Each asserted claim of each Asserted Patent is an apparatus claim. Exh. 1 at Admission No. 1.

3. [REDACTED]

[REDACTED]

¹ “Defendants” are T-Mobile USA, Inc., T-Mobile U.S. (collectively, “T-Mobile”), Cellco Partnership d/b/a Verizon Wireless (“Verizon”), CommScope Technologies, LLC (“CommScope”), and Cellmax Technologies AB (“Cellmax”).

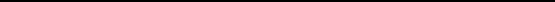
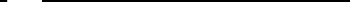
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B. Fractus Also Failed to Require its Licensee and Development Partner to Mark

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C. Fractus Did Not Provide any Defendant Actual Notice of Alleged Infringement Before Filing its Complaints

25. Fractus's Vice President of Licensing and Rule 30(b)(6) witness regarding Fractus's litigation activities admitted that [REDACTED]

26. Fractus's responses to Defendants' requests for admission confirm that Fractus did not provide actual notice of the alleged infringement prior to filing suit. Exh. 53 at 80:3-81:10, Exh. 56.

IV. LEGAL STANDARD

Summary judgment must be granted when there is no “genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Once the moving party identifies those portions of the record that demonstrate the absence of a genuine issue of material fact, the non-moving party bears the burden of coming forward with evidence sufficient for “a reasonable jury [to] return a verdict for the non-moving party.”” *Crawford v. Formosa Plastics Corp., La.*, 234 F.3d 899, 902 (5th Cir. 2000) (quoting *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990). Summary judgment “is appropriate if the non-movant ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case.’” *Bluebonnet Hotel Ventures, LLC v. Wells Fargo Bank, N.A.*, 754 F.3d 272, 276 (5th Cir. 2014) (quoting *Celotex*, 477 U.S. at 322).

Patentees making, offering for sale, selling, or importing any “patented article” in the U.S., and any others doing so under patentees (e.g., licensees), may mark the article with the patent number to provide constructive notice of infringement. 35 U.S.C. § 287; *Arctic Cat Inc. v. Bombardier Recreational Products, Inc.*, 876 F.3d 1350, 1365-67 (Fed. Cir. 2017). Absent such marking, “no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice.” 35 U.S.C. § 287; *Arctic Cat*, 876 F.3d at 1365-66. Actual notice under § 287 requires that Fractus affirmatively communicate a specific charge of “the infringement,” not merely notice of the patent’s existence or ownership. *See Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994). If the patentee fails to prove that it provided actual or constructive notice before filing suit, then the patentee cannot pursue damages for any period before the filing of the complaint. 35 U.S.C. § 287; *see also Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996) (explaining that plaintiff-patentee bears the burden of proving compliance with marking statute); *Arctic Cat*, 876 F.3d at 1366-67 (holding that the duty of alleging and the burden of proving marking and actual notice is on the plaintiff).

V. ARGUMENT

A. Fractus Cannot Demonstrate Compliance With § 287(a)

Fractus asserts claims from five patents. *See* Statement of Undisputed Facts (“SUF”), ¶ 1.

Every asserted claim in each case is an apparatus claim. SUF, ¶ 2. As explained below, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Fractus also

failed to provide any Defendant actual notice of infringement prior to filing this lawsuit. As a matter of law, therefore, Fractus cannot recover pre-suit damages. *See, e.g., American Medical Sys. v. Medical Eng’g Corp.*, 6 F.3d 1523, 1537 (Fed. Cir. 1993) (“[W]e construe section 287(a) to preclude recovery of damages only for infringement for any time prior to compliance with the marking or actual notice requirements of the statute.”); 35 U.S.C. § 287.

1. Fractus Failed To Require Licensee [REDACTED] To Mark Its Allegedly Practicing Products

The facts regarding licensee [REDACTED] sales of allegedly practicing products are undisputed. [REDACTED] and Fractus executed a settlement and license agreement on [REDACTED]. SUF, ¶ 5. The license agreement [REDACTED]

[REDACTED] Over a period extending both before and since Fractus and [REDACTED] executed the license agreement, [REDACTED]

[REDACTED] Since the [REDACTED] License was executed, [REDACTED]

[REDACTED]. Fractus itself contends that the antennas sold by [REDACTED] practice the Asserted Patents and provided contention charts for each of the [REDACTED] [REDACTED]. SUF, ¶¶ 11-12.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Failure to require an actively selling licensee to mark its practicing [REDACTED]—does not constitute “substantially consistent and continuous marking” or “reasonable efforts to ensure [licensees’] compliance with the marking requirements.” *Maxwell*, 86 F.3d at 1111-12; *AMS*, 6 F.3d at 1537; *Acantha LLC v. Depuy Orthopedics Inc.*, 2018 WL 2290715, at *7, Case No. 15-c-1257 (E.D. Wis. May 19, 2018) (“no reasonable juror could conclude that Acantha substantially complied with the statute when only five to seven percent of the licensed product was marked”). No court has found that a complete failure of a licensee to mark is acceptable to provide constructive notice.

While Fractus claims that it conducted an investigation of [REDACTED] products in 2014 (Dkt. No. 298 at 12), it has claimed privilege over the details of that investigation and has not identified any court that has found that a cursory investigation that wholly missed public evidence of sales activity before entering into a license is sufficient to demonstrate “reasonable efforts.” Dkt. No. 298 at 12; SUF, ¶¶ 17-18; *see Maxwell*, 86 F.3d at 1111-12. Further, there is no authority supporting a finding that an investigation that only took place at the time a license was signed was sufficient to constitute reasonable efforts over the *entire* time period that a licensee was selling unmarked patent-practicing products.³

2. Fractus Failed To Mark Its Own Allegedly Practicing Products Manufactured And Sold By Licensee [REDACTED]

³ Fractus also has asserted privilege over the alleged investigation. SUF, ¶ 17. But “attorney-client privilege cannot be used as both a sword and a shield.” *In re OptumInsight, Inc.*, No. 2017-116, 2017 WL 3096300, at *3 (Fed. Cir. July 20, 2017). Thus, Fractus should not be permitted to selectively rely on parts of that alleged investigation to raise a factual dispute.

Fractus's marking failures also predate the [REDACTED] license. Fractus has identified products that it developed with its licensee [REDACTED] as practicing the Asserted Patents. *See* Section III.B, above; *see also* SUF, ¶¶ 19-22. Fractus's Rule 30(b)(6) witnesses testified [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, Fractus also cannot demonstrate that it met the marking requirements for the allegedly practicing Fractus-[REDACTED] products.

3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The unrebutted evidence demonstrates that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] confirms that Fractus never made "reasonable efforts to ensure compliance with the marking requirements." *Maxwell*, 86 F.3d at 1111-12.

4. Fractus Did Not Provide Defendants Actual Notice Prior To Filing Suit

As an alternative to the marking provision, actual notice requires a "specific charge of infringement by a specific accused product or device." *Amsted*, 24 F.3d at 187; *see* 35 U.S.C. § 287(b)(5)(A) (explaining that notice of infringement requires actual knowledge or receipt of

“information sufficient to persuade a reasonable person that it is likely that a product was made by a process patented in the United States”); *Mass. Inst. of Tech. v. Abacus Software, Inc.*, No. CIV A 501-CV344, 2004 WL 5268125, at *3 (E.D. Tex. Sept. 29, 2004).

Fractus has no evidence that it provided actual notice of infringement prior to filing suit and has admitted that it did not provide any Defendant with actual notice of infringement of any Asserted Patent prior to filing suit on April 9, 2018.⁴ SUF, ¶¶ 26-27. Accordingly, actual notice does not save Fractus’s pre-suit damages claim. 35 U.S.C. § 287; *Amsted*, 24 F.3d at 187.

B. Fractus’s Failure To Mark Or To Give Actual Notice Bars All Pre-Suit Damages

Fractus’s failures relating to marking and actual notice of infringement bar pre-suit damages as a matter of law. *American Medical Sys.*, 6 F.3d at 1537; 35 U.S.C. § 287(a).

First, it is undisputed that: [REDACTED]

[REDACTED]
[REDACTED]

[REDACTED] and (iv) Fractus did not provide any Defendant any actual notice of

⁴ Fractus admits that prior to filing of its complaints, Fractus provided no notice of its allegations of infringement to Verizon, CommScope, and CellMax. *See* Exh. 53 at 80:3-82:6; Exh. 56 (Fractus’s Objections and Responses to Verizon’s First Set of RFAs), Response to RFA No. 5; Exh. 57 (Fractus’s Objections and Responses to CommScope’s First Set of RFAs), Responses to RFA No. 1-3. [REDACTED]

[REDACTED] Exh. 58 (Fractus’s Objections and Responses to T-Mobile’s First Set of RFAs), Responses to RFA No. 1-3. [REDACTED]

[REDACTED] *Amsted*, 24 F.3d at 187; *Semiconductor Energy Lab. Co. Ltd. v. Chi Mei Optoelectronics Corp.*, 531 F. Supp. 2d 1084, 1115 (N.D. Cal. 2007); *ZitoVault, LLC v. International Business Machines Corp.*, Case No. 16-cv-0962-M, 2018 WL 2971131, at *3 (N.D. Tex. Mar. 29, 2018).

infringement of any of the Asserted Patents. This marking/notice failure precludes recovery of pre-suit damages under the plain language of 35 U.S.C. § 287, which states that under these circumstances, “**no** damages shall be recovered by the patentee in any action for infringement.” 35 U.S.C. § 287 (emphasis added); *see also Amsted*, 24 F.3d at 185. Failure to mark patented articles under § 287 at any point pre-suit results in no damages until after actual notice is provided, according to the plain language of § 287. 35 U.S.C. § 287(a); *Adrea, LLC v. Barnes & Noble, Inc.*, No. 13-CV-4137 JSR, 2015 WL 4610465, at *3 (S.D.N.Y. July 24, 2015) (*disagreed with on other grounds by Arctic Cat*, 876 F.3d at 1368).

Fractus likely will point to cases adopting the opposite view—that a patentee who fails to mark products or require its licensees to mark products in contravention of Section 287(a) may still recover damages for some period prior to when a marking duty began; indeed, there is a district court split on this issue unresolved by the Federal Circuit. *See, e.g., WiAV Solutions LLC v. Motorola, Inc.*, 732 F. Supp. 2d 634, 639-40 (E.D. Va. 2010). These cases were wrongly decided, as explained by the district court in *Adrea*. Citing the Supreme Court, the *Adrea* Court explained that Section 287(a) “is clear that, where plaintiff fails to mark its patented articles, it may not recover damages until after it gives actual notice to the accused infringer.” *Adrea*, 2015 WL 4610465, at *3 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) that “where the statutory language is unambiguous and the statutory scheme is coherent and consistent, the Court’s inquiry must cease”). The *WiAV* decision and its progeny do not recognize the plain language of the statute. Rather, these cases look at the supposed underlying purposes of the marking statute, and interpret them not as they are plainly written, but rather to enact these unwritten purposes. *E.g., WiAV*, 732 F. Supp. 2d at 639. It is not up to courts to rewrite statutes to serve unstated purposes; the courts must apply the statutes as written. *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917)

(“Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise.”) Thus, based on the undisputed facts and the plain language of the statute, Fractus cannot recover damages prior to the date of actual notice—the April 9, 2018 filing of the Complaints.

Second, Fractus’s [REDACTED]

[REDACTED] See Section III.B, above. [REDACTED], coupled with Fractus’s failure to provide Defendants actual notice of infringement of any Asserted Patent, [REDACTED]

[REDACTED] See *Arctic Cat*, 334 F. Supp. 3d 1238, 1247-48 (S.D. Fla. 2018) (rejecting patentee’s argument that it was entitled to past damages for period where no practicing products were sold); *AMS*, 6 F.3d at 1537-38 (indicating that following an initial failure to mark, no pre-suit damages are available until actual notice is given or the marking requirements are satisfied); *Amsted*, 24 F.3d at 185. In addition to having no evidence that it later satisfied the marking requirements for any practicing product for any Asserted Patent, [REDACTED]

[REDACTED]—further confirming that Fractus made no effort to ensure proper marking for any of the pre-suit timeframe and that Fractus should not be entitled to pre-suit damages. SUF, ¶ 3; see *Arctic Cat*, 334 F. Supp. 3d at 1247-48; *AMS*, 6 F.3d at 1537-38; *Amsted*, 24 F.3d at 185.

VI. CONCLUSION

For the reasons above, there is no genuine dispute that (1) Fractus did not provide constructive notice by meeting the marking requirements; and (2) Fractus did not provide actual notice to any Defendant or Defendant-Intervenor. Accordingly, this Court should grant summary judgment of no pre-suit damages.

DATED: June 3, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this June 3, 2019 with a copy of this document via electronic mail.

Dated: June 3, 2019

/s/ Douglas M. Kubehl
Douglas M. Kubehl

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that this document is being filed under seal pursuant to the Protective Order entered in this matter.

Dated: June 3, 2019

/s/ Douglas M. Kubehl

Douglas M. Kubehl